Filed 12/8/09 P. v. Miles CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARSHALL MILES, Defendant and Appellant.	C056539 (Super.Ct.No. 06F09531)

A jury found defendant Marshall Miles guilty of possessing cocaine base and marijuana for sale (Health & Saf. Code, §§ 11351.5, 11359). Finding that defendant had two prior drug convictions (Health & Saf. Code, § 11370.2, subd. (a)) and had served two prior prison terms (Pen. Code, § 667.5, subd. (b)), the court sentenced him to an aggregate term of 13 years in state prison.

On appeal, defendant contends the trial court (1) abused its discretion in permitting the prosecution to present evidence of three prior drug offenses committed by defendant, (2) erred in failing to give the jury a unanimity instruction, (3) improperly

instructed the jury on flight as evidence of consciousness of guilt, and (4) violated his constitutional rights when imposing the upper term for the cocaine conviction. We shall affirm the judgment.

BACKGROUND

At around 8:00 p.m. on October 25, 2006, officers conducted a parole search of the one-bedroom apartment that defendant shared with Sylvia Soto and their three-year-old child. Defendant was not home.

A clear plastic baggie containing 16 baggies of cocaine base was found in a dresser drawer with women's undergarments. Six large bags and three small bags of marijuana, and one bag with 21 or 22 pieces of rock cocaine, were found in a shoe box in the bedroom closet that contained men's and women's clothing. Defendant's fingerprint was found on one of the bags of marijuana. Six baggies of marijuana and $530 in cash were found in the pocket of a man's leather jacket in the hall closet. Soto signed a form disclaiming ownership of the cash.

After officers advised Soto that she was being arrested for possession of narcotics, they allowed her to call defendant on the telephone. Soto told him that she would be arrested if he did not come home. Detective Robert Tracy then got on the telephone and informed defendant that the apartment had been searched and officers intended to arrest Soto. Defendant said he would be at the apartment in 15 or 20 minutes. No one told defendant what the officers had found during the search or why Soto was being arrested.

When defendant did not arrive at the apartment, Detective Tracy called defendant again, reiterated there had been a search of the

apartment, and said defendant needed to come home. Defendant replied that he was on his way and would be there in five to ten minutes. Although officers were at his apartment for several hours, defendant never showed up. An arrest warrant was issued, and defendant was apprehended on January 11, 2007.

Soto pled no contest to possession of rock cocaine for sale and was placed on probation with the understanding that she would not be charged with any other crimes based on her testimony at defendant's trial.

Soto testified that she had been making extra money selling cocaine and marijuana while defendant was in prison, and she had continued to do so after his release. She claimed that defendant did not know what she was doing and did not help her. She did not know how defendant's fingerprint got onto the bag of marijuana officers found in the closet, nor did she know how the baggies of marijuana got into defendant's jacket pocket. According to Soto, the money found in defendant's jacket was money that she had given him to pay for car repairs.

Defendant did not testify at his trial.

DISCUSSION

I

Defendant contends the trial court abused its discretion in allowing the prosecution to present evidence of three of defendant's prior drug offenses.

Citing Evidence Code section 1101, subdivision (b), the People moved in limine to introduce evidence regarding defendant's five prior possessions of rock cocaine and/or marijuana. (Further section

references are to the Evidence Code unless otherwise specified.) The People claimed that the evidence was relevant to show defendant's "knowledge of the presence of the drugs in his apartment; his intent to sell those drugs; the existence of a common plan or scheme to sell drugs; and the absence of mistake regarding his fingerprint on one of the marijuana bags." The trial court did the analysis, including a section 352 assessment, and ruled that evidence of three of the five prior drug possessions could be presented to the jury as follows:

In April 2001, a plastic bag containing 6.8 grams of marijuana and another bag containing three individually wrapped pieces of rock cocaine were seized from defendant's jacket. A third bag of rock cocaine was seized from another jacket in defendant's possession.

In September 2002, defendant was riding in the front passenger seat of a car that Soto was driving when they were stopped by police. Officers found a piece of rock cocaine under the passenger seat, a plastic bag containing 14 small blue baggies of marijuana and four individually wrapped pieces of rock cocaine inside the center console, and $341 in cash rolled up in a dirty sock.

In December 2002, defendant possessed a plastic bag containing 35 individually wrapped pieces of rock cocaine.

The trial court excluded evidence that defendant possessed a large baggie and 10 smaller baggies of marijuana in September 1999, and that he possessed 39 small rocks of cocaine base and 8 small baggies of rock cocaine in June 2000.

At the in limine hearing, the prosecutor clarified the People sought to introduce the evidence to show defendant's knowledge of the character and nature of the controlled substances. The defense

then offered to stipulate that "whoever possessed the contraband at issue possessed that contraband with the intent to sell," on the condition that all evidence of prior possessions would be excluded, that defendant's prior drug convictions would be sanitized if he chose to testify, and that the circumstances surrounding Soto's 2002 arrest, offered for impeachment, would also be excluded.

We quote the trial court's explanation for its ruling that evidence of the three prior offenses could be introduced.

". . . I don't find that the prior conduct would be admissible on the theory that it would establish knowledge of the presence of the narcotics. I don't find that any of the prior conduct would be relevant to rebut any claim of mistake.

"So my focus is on intent, character and nature of the controlled substance and common plan or scheme.

"So on the issue of intent and knowledge of the character and nature of the controlled substance, the People correctly point out in their motion that under the *Ewoldt* . . . authority the least degree of similarity between the uncharged act and the charged [is] required in order to prove intent. [*People v. Ewoldt* (1994) 7 Cal.4th 380.]

"[¶] . . . [¶]

" . . . [The] three newer cases I find . . . are sufficiently similar to support an inference that [defendant] harbored the same intent when he was in possession of the controlled substance in the present case.

"It is also going to prove knowledge and character of the controlled substance[s]. So the People, if they wish to, can

introduce the December of 2002, September 2002 and April 2001 conduct for that purpose.

"Now, as to common plan or scheme, the test is whether the prior conduct is sufficiently similar, possesses a sufficiently high degree of common features with the act charged that they warrant the inference that if the defendant committed the other acts then he committed the acts charged in this case.

"And for that issue the Court is focusing on two of the . . . prior convictions or prior conduct. There is . . . September of 2002 and April 2001 conduct. In both cases the defendant was found to be in possession of both rock cocaine and marijuana.

"In the 2002 case a large sum of cash was found in some article of clothing. Also the 2002 case involved Ms. Soto as in that case the driver of the vehicle. And the 2001 case, the . . . marijuana and rock cocaine were found in the defendant's jacket. And in the current case, again both rock cocaine and marijuana are found in the defendant's residence.

"This is a residence he shares with the same Ms. Soto from the 2002 case. The narcotics are packaged similarly as those in the 2001 and 2002 cases. Both the marijuana and large sum of cash [are] found in an article of clothing, a man's jacket is what I recall, in the residence.

"So I find that those two cases are highly probative and carry distinctive marks and the defendant was found to be in possession of the same two types of controlled substances. They are packaged similarly. There is a large sum of cash found in the clothing and

in the 2002 case has the additional distinctive mark because it involves Ms. Soto.

"And also in that particular case the packaging was similar. There was blue baggies used in that case. And in this there was some controlled substance in the blue baggy or within the blue baggy."

The trial court further found that the probative value of the evidence was "substantial and not outweighed by the probability that its admission would create a serious danger of und[ue] prejudice of confusing the issues or misleading the jury."

We see no abuse of discretion, as we will explain.

Section 1101, subdivision (b) permits introduction of evidence of a defendant's uncharged crimes to prove knowledge and intent, among other things. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123; *People v. Ewoldt, supra,* 7 Cal.4th at p. 402, fn. 6; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [prior narcotics offenses relevant to knowledge and intent].) To be admissible, such evidence must have substantial probative value that is not outweighed by its potential for undue prejudice. (*People v. Lenart*, *supra*, 32 Cal.4th at p. 1123.) Evidence is unduly prejudicial under section 352 if it tends to evoke an emotional bias against the defendant without regard to any issue in the case, not simply that it is damaging evidence. (*People v. Crew* (2003) 31 Cal.4th 822, 842.)

A trial court's evidentiary ruling to permit such evidence will be overturned only if the court exercised its discretion arbitrarily and capriciously, resulting in a miscarriage of justice. (*People v.*

Carter (2005) 36 Cal.4th 1114, 1147; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In a prosecution alleging unlawful possession of a controlled substance for sale, the People must prove the accused possessed the contraband with the intent of selling it and with knowledge of both its presence and its illegal character. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.)

For purposes of determining the admissibility of evidence pursuant to section 1101, subdivision (b), a plea of not guilty places all elements of the charged offense in dispute, "'unless the defendant has taken some action to narrow the prosecution's burden of proof.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 400, fn. 4, quoting from *People v. Daniels* (1991) 52 Cal.3d 815, 857-858.)

There is no requirement that a defendant dispute the element of knowledge before a prosecutor may introduce relevant evidence on the issue. (*People v. Ellers* (1980) 108 Cal.App.3d 943, 953.) The "'prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400, fn. 4, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 69 [116 L.Ed.2d 385, 397].) Indeed, the prosecutor is not compelled to accept a stipulation if it would deprive the People of the right to introduce persuasive and forceful evidence on an element of the crime. (*People v. Scheid* (1997) 16 Cal.4th 1, 17; *People v. Thornton* (2000) 85 Cal.App.4th 44, 49.)

Thus, although defendant's position at trial focused on his alleged lack of knowledge of the *presence* of the drugs, rather than

the *nature* of the drugs, the evidence that he knew of the illegal character of the substances in the apartment remained relevant to establish a necessary element of the offense.

And to obtain a conviction, the prosecution had to prove that defendant had knowledge of presence of the drug in the apartment. (*People v. Harris, supra,* 83 Cal.App.4th at p. 374; *People v. Romero* (1997) 55 Cal.App.4th 147, 156.) As defendant acknowledges, his position at trial was Soto had exclusive possession of the drugs, and defendant had no knowledge of their presence in the apartment. Thus, evidence tending to establish a common plan or scheme was probative to show he had knowledge and possession of the drugs in this case.

"In order to be relevant as a common design or plan, 'evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."' [Citation.] . . . '[T]he common features must indicate the existence of a plan rather than a series of similar spontaneous acts,' and . . . 'evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the *same* design or plan he or she used in committing the uncharged acts.' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 111, original italics.)

Here, the trial court found that defendant's prior drug crimes shared common features with the crimes for which he was on trial.

Like the charged offenses, in April 2001 defendant possessed both marijuana and rock cocaine; the contraband was packaged in small baggies inside a bigger baggie; and it was found in defendant's jacket. The December 2002 incident also involved rock cocaine (35 small baggies inside a larger baggie). In September 2002, defendant possessed the same two substances as in this case, marijuana and rock cocaine; he possessed them while he was with Soto, as he allegedly did in the charged crimes; and in both incidents a large sum of money was secreted in clothing, and the marijuana was in blue baggies.

The trial court did not abuse its discretion in concluding that the similarities in the substance and manner of defendant's prior possessions of illegal substances tended to demonstrate that he likewise knew of, and jointly possessed, the substances at issue in this case.

Nor can we find any abuse of discretion in the trial court's ruling that the probative value of the evidence outweighed potential prejudice.

Factors to be considered in this regard include, "(1) whether the inference of a common design or plan is strong; (2) whether the source of evidence concerning the present offense is independent of and unaffected by information about the uncharged offense; (3) whether the defendant was punished for the prior misconduct; (4) whether the uncharged offense is more inflammatory than the charged offense; and (5) whether the two incidents occurred close in time." (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1690, disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123; see also § 352.)

Knowledge was a vital component of the prosecutor's burden of proof. The prior offenses were wholly independent of the current charges and were not more inflammatory. Furthermore, the trial court gave the jury limiting instructions on the use of the prior offense evidence both prior to the presentation of the evidence, and again when instructing the jury prior to deliberations. Jurors were told they could consider the prior crimes evidence only "for the limited purpose of deciding whether or not, one, the defendant acted with the intent to sell the controlled substance alleged in Counts 1 and 2 in this case[,] or, two, the defendant knew the character and nature of the controlled substance alleged in Count[s] 1 and 2 when he allegedly acted in this case[,] or, three, the defendant had a plan or scheme to commit the offenses alleged in this case. [¶] In evaluating the evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." We presume the jurors followed the instructions. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

For the reasons stated above, there was no prejudicial error.

II

The jury found defendant guilty of possessing both cocaine base and marijuana. Defendant argues the trial court erroneously failed to instruct jurors that they must "unanimously agree on whether [he] had either joint or exclusive control over each of the substances found in each potion [sic] of the apartment." We are not persuaded.

The contraband was found in the following locations: (1) 16 small baggies of cocaine base in a dresser drawer containing women's undergarments; (2) six large bags and three small bags of marijuana, and one bag with 21 or 22 pieces of rock cocaine, in a shoe box in a closet that contained both men's and women's clothing; and six baggies of marijuana and $530 in the pocket of a man's leather jacket in the hall closet.

As a general rule, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' [Citation.]" (*Ibid.*, italics omitted.)

But a unanimity instruction is not required "when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) It is also unnecessary, even when there are two criminal acts, where "'there was no evidence . . . from which the jury could have found defendant was guilty'" of one act but not the other. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199, quoting *People v. Carrera* (1989) 49 Cal.3d 291, 311-312.) Such is the case here.

In argument, the prosecutor combined all the cocaine into one possession and all the marijuana into one possession and argued that defendant and Soto were running a joint operation. The defense was that Soto possessed all the drugs and defendant had no knowledge of their presence in the apartment. Thus, a unanimity instruction was not required because "defendant offer[ed] essentially the same defense to each of the acts, and there [was] no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz*, *supra*, 51 Cal.3d at p. 100.)

III

Asserting there was no evidence of flight, defendant contends it was prejudicial error to give the flight instruction.

The trial court instructed the jury as follows with CALCRIM No. 372: "If the defendant fled immediately after he was accused of committing the crimes in this case, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." CALCRIM No. 372 is based on Penal Code section 1127c.

As the People point out, defendant failed to object to the instruction. (When trial court said it would give CALCRIM No. 372 "[u]nless there is [an] objection to that," defense counsel replied, "No. We reviewed it.")

"'[A]n objection to a cautionary instruction has been required before the defendant may assert error on appeal because a defendant "may not sit silently during the course of his trial; create a situation which may be to his advantage or disadvantage and

require the court to make an election on his behalf without being bound by that election." [Citations.]'" (*People v. Franco* (1994) 24 Cal.App.4th 1528, 1539, quoting *People v. Toro* (1989) 47 Cal.3d 966, 975, disapproved on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

The instruction on flight is such a cautionary instruction. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224.) It and other consciousness of guilt instructions tell the jury "that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity [is] not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions [thus] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*Id.* at p. 1224.) Because the flight after crime instruction is a cautionary instruction benefiting the defendant, he forfeits a claim of error by not objecting to the instruction at trial.

In any event, the evidence supported the instruction. After the apartment was searched, Soto spoke to defendant on the telephone and told him that she would be arrested if he did not come home. Detective Tracy also spoke to defendant on the telephone, informing him of the search and intent to arrest Soto. Both times, defendant said he would come home, but he never did. Neither Soto nor Tracy told defendant that drugs had been found in the apartment during the search, but an officer did tell defendant "to be a man and come home and take the blame." He was arrested about three months later.

Based on this evidence, a reasonable juror could conclude that defendant's failure to return to the apartment constituted "flight" immediately after he knew he was suspected of committing crimes, and that his flight from law enforcement officers by failing to return to the residence where he lived with Soto and their child supported an inference of guilt. As the prosecutor argued, the jury could infer defendant did not return to the apartment because "he knew that there was a substantial amount of rock cocaine and marijuana in the apartment and he didn't want to get caught." Accordingly, the flight after crime instruction was properly given to the jury.

IV

Defendant contends that imposition of the upper term violated *Cunningham v. California* (2007) 549 U.S. 270, 274 [166 L.Ed.2d 856, 864] (hereafter *Cunningham*), because all the factors upon which the trial court relied were not tried to a jury. He argues that *People v. Black* (2007) 41 Cal.4th 799, with its "single factor eligibility test," does not comport with the decision in *Cunningham*.[1]

Defendant asks to apply the Supremacy Clause to depart from California Supreme Court precedent and to find that his sentence

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[1] In *Cunningham*, the United States Supreme Court held that under California's former determinate sentencing law, the middle term was the statutory maximum that a judge may impose solely based on the facts either reflected in the jury verdict or admitted by the defendant. Thus, except for a prior conviction, any fact that increases the penalty for a crime beyond the middle term must be tried to the jury and proved beyond a reasonable doubt. (*Cunningham*, *supra*, 549 U.S. at p. 281 [166 L.Ed.2d at p. 869].)

is unconstitutional. We cannot do so. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, defendant fails to acknowledge in any meaningful way that he was sentenced after the Legislature amended Penal Code section 1170 to remove the presumption of a middle term and provide the trial court with broad discretion to impose the lower, middle, or upper term by simply stating reasons for imposing the selected term on the record. (Stats. 2007, ch. 3, § 2.) As a result of the amendment, the upper term, rather than the middle term, is now the statutory maximum that may be imposed without additional factfinding. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851.)

Because defendant was sentenced under the amended statute, *Cunningham* has no application to this case.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect that the prior drug conviction enhancements were imposed pursuant to Health and Safety Code section 11370.2, subdivision (a), not section 11370 as erroneously listed in the abstract.

SCOTLAND, P. J.

We concur:

HULL, J.

BUTZ, J.